168

No. 10-81

SUPREME COURT, U.S.
AUG 12 2010

In The
Supreme Court of the United States

JOE H. BRYANT, JR.,

Petitioner,

v.

MILITARY DEPARTMENT OF THE STATE OF MISSISSIPPI, BY AND THROUGH THE MISSISSIPPI AIR NATIONAL GUARD, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF MISSISSIPPI AIR NATIONAL GUARD TO PETITION FOR WRIT OF CERTIORARI

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August 12, 2010

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QUESTIONS PRESENTED

1. Whether Petitioner's failure to raise issues found dispositive below precludes the grant of certiorari by this Court.

2. Whether Petitioner's failure to brief the sole issue listed with respect to this Respondent precludes the grant of certiorari by this Court.

3. Whether Petitioner fails to present an issue, based on the record and decision below, worthy of consideration by this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT AND AUTHORITIES 7

I. PETITIONER'S VIOLATION OF SUP. CT. R. 14 THROUGH HIS FAILURE TO LIST THE ELEVENTH AMENDMENT, *WILL* AND WAIVER GROUNDS DISPOSITIVE IN FAVOR OF THIS RESPONDENT BELOW IS FATAL TO HIS PETITION 7

II. PETITIONER'S FAILURE TO BRIEF EITHER THE *FERES*, ELEVENTH AMENDMENT OR *WILL* GROUNDS FOR THIS RESPONDENT'S DISMISSAL IS FATAL TO HIS PETITION 9

III. THERE IS NO CIRCUIT SPLIT OR OTHER JUSTIFICATION FOR A GRANT OF CERTIORARI 11

CONCLUSION 14

APPENDIX

CHART REPRESENTING STATE VERSUS FEDERAL CAPACITIES OF MISSISSIPPI NATIONAL GUARD ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Berry v. Jefferson Parish, 326 Fed.Appx. 748 (5th Cir. 2009) 5, 10

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 9

Bryant v. Military Dep't of Miss., 597 F.3d 678 (5th Cir. 2010) 1, 5, 11

Bryant v. Military Dep't of State of Miss., 381 F.Supp.2d 586 (S.D. Miss. 2005) 1, 4

Bryant v. Military Dep't of State of Miss. ex rel. Miss. Air Nat'l Guard; (unpublished) No. 3:05cv179-TSL-AGN (August 15, 2005) 1

Chappell v. Wallace, 462 U.S. 296 (1983) 6

Costner v. Oklahoma Army Nat'l Guard, 833 F.2d 905 (10th Cir. 1987) 11

Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986) 11

Farmer v. Mabus, 940 F.2d 921 (5th Cir. 1991) 11

Feres v. United States, 340 U.S. 135 (1950) ..... *passim*

Hefley v. Textron, Inc., 713 F.2d 1487 (10th Cir. 1983) 12

Hefrich v. Pennsylvania Dept. of Military Affairs, 660 F.2d 88 (3rd Cir. 1981) 12

Henry v. Textron, Inc., 577 F.2d 1163 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047 (1978) 12

TABLE OF AUTHORITIES – Continued

Page

Holdiness v. Stroud, 808 F.2d 417 (5th Cir. 1987) 11

Jones v. New York State Div. of Military Affairs, 166 F.3d 45 (2d Cir. 1999) 12

Justiss Oil Co. v. Kerr-McGee Ref. Corp., 75 F.3d 1057 (5th Cir. 1996) 4, 10

Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765 (7th Cir. 1993) 11, 12

Lovell v. Heng, 890 F.2d 63 (8th Cir. 1989) 11

Maryland ex rel. Levin v. United States, 381 U.S. 41 (1965) 12

NeSmith v. Fulton, 615 F.2d 196 (5th Cir. 1980) 12

Perpich v. DOD, 496 U.S. 334 (1990) 12

Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976) 9

U.S. v. Stanley, 483 U.S. 669 (1987) 6

United States v. Martinez, 263 F.3d 436 (5th Cir. 2001) 4, 10

Walch v. Adjutant General's Dept. of Tex., 533 F.3d 289 (5th Cir. 2008) 11

Watson v. Arkansas Air Nat'l Guard, 886 F.2d 1004 (8th Cir. 1989) 11

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) ..... *passim*

Wood v. Allen, ___ U.S. ___, 130 S.Ct. 841 (Jan. 20, 2010) 8

TABLE OF AUTHORITIES – Continued

Page

Wood v. United States, 968 F.2d 738 (8th Cir. 1992) 11

Wright v. Park, 5 F.3d 586 (1st Cir. 1993) 11

Yee v. City of Escondido, Cal., 503 U.S. 519 (1992) 8, 13

CONSTITUTION AND STATUTES

U.S. Const. amend. I 3

U.S. Const. amend. XI ..... *passim*

10 U.S.C. § 101(c)(2) 12

10 U.S.C. § 1034 3

28 U.S.C. § 1254 2

42 U.S.C. § 1983 ..... 3, 5, 7, 10, 13

42 U.S.C. § 1985 ..... 3, 5, 7, 10, 13

42 U.S.C. § 1986 ..... 3, 5, 10

Miss. Code Ann. §§ 25-9-171 through 25-9-177 (1972) 3

Miss. Code Ann. § 33-1-1 (1972) 3

Miss. Code Ann. § 33-3-3 3

RULES

Fed R. App. P. 28(a)(9)(A) 5, 10

Sup. Ct. R. 14 ..... 5, 7, 8, 9, 13

TABLE OF AUTHORITIES – Continued

Page

Sup. Ct. R. 23.1(c) 9

Sup. Ct. R. 42(2) 14

Sup. Ct. R. 42(7) 14

OPINIONS BELOW

Bryant v. Military Dep't of Miss., 597 F.3d 678 (5th Cir. 2010). Pet. App., p. 1-29. In Petitioner's appeal of the trial court orders dismissing all claims against all Defendants, save Defendants F. Gregory Malta and Robert E. Pierce, the Fifth Circuit "AFFIRM[ED] the district court's dismissal of all claims against the MSANG and the individual Appellees in their official capacities and its two separate grants of summary judgment in the Individual Appellee's favor. On cross-appeal, we AFFIRM the district court's sanctions decision" denying MSANG's motion for sanctions against Petitioner COL (ret.) Bryant. Pet. App., p. 29.

Bryant v. Military Dept. of State of Miss. ex rel. Miss. Air Nat'l Guard, 381 F.Supp.2d 586 (S.D. Miss. Aug. 26, 2005). Pet. App., p. 74-89. In its "Corrected Memorandum Opinion and Order,"[1] the district court

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[1] *Bryant v. Military Dept. of State of Miss. ex rel. Miss. Air Nat'l Guard* (unpublished) No. 3:05cv179-TSL-AGN (August 15, 2005) (United States District Court for the Southern District of Mississippi, Jackson Division). This original opinion is not only unpublished, but was stricken from the district court docket and replaced with the August 26, 2005 Corrected Memorandum Opinion and Order. The original district court memorandum opinion and order dismissed all Petitioner COL (ret.) Bryant's claims against Respondent MSANG, as well as all official capacity claims against the individual Respondents.

There is no substantive difference between the district court's August 26, 2005 Corrected Memorandum Opinion and Order and the original August 15, 2005 Memorandum Opinion and Order. Rather, the August 26, 2005 version merely deleted a

(Continued on following page)

"ordered that MSANG's motion to dismiss is granted, as are the motions of the individual named defendants in their official capacities. It is further ordered that the motions of the remaining defendants in their individual capacities are denied as set forth herein." Pet. App., p. 89.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 20, 2010.

STATEMENT OF THE CASE

This suit concerns military-related personnel claims brought by a retired Mississippi Air National Guard ("MSANG") officer. Petitioner COL (ret.)[2] Bryant's original Complaint pled a myriad of allegedly wrongful acts by the MSANG, and thirteen of its current or retired Guardsmen.

The core of Petitioner COL (ret.) Bryant's Complaint is that he suffered numerous adverse military

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stray reference to "defendant Cross[ ]" on page 3 of the original opinion – which was an inadvertent error, as Cross has never been a defendant in this suit.

[2] "COL (ret.)" means Retired Colonel.

personnel actions, including forced retirement, all supposedly in retaliation for reporting perceived military wrongdoing to military authorities, including the Active Component Inspector General of the Air Force. Pet. App., p. 3. Petitioner COL (ret.) Bryant's original Complaint[3] asserted six causes of action against Respondent MSANG: (1) the Military Whistleblower Protection Act, 10 U.S.C. § 1034; (2) a claim under the First Amendment; (3) 42 U.S.C. § 1983; (4) 42 U.S.C. § 1985; (5) 42 U.S.C. § 1986; and (6) the Mississippi Whistleblower Protection Act, Miss. Code Ann. §§ 25-9-171 through 25-9-177 (1972). Pet. App., p. 2.

Respondent MSANG[4] refers to the Fifth Circuit and district court's descriptions of further relevant

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[3] The district court dismissed all claims against MSANG before Petitioner COL (ret.) Bryant was granted leave to amend his Complaint as to his claims against the individual Defendants.

[4] Petitioner COL (ret.) Bryant's Complaint names as an entity Defendant the "Military Department of the State of Mississippi, by and through the Mississippi Air National Guard." However, there is no such entity. The Mississippi Military Department and the Mississippi Air National Guard are two separate and distinct state entities. *Compare* Miss. Code. Ann. § 33-3-3 (1972) (Mississippi Military Department) *with* Miss. Code Ann. § 33-1-1 (1972) (MSANG) *and* Miss. Code Ann. § 33-1-1(c) (1972) (MSNG). Looking to the substance of COL (ret.) Bryant's claims, it is clear that he is intending to proceed against the MSANG, as the allegations he pled all relate to supposed incidents relating to his military service in the Guard, and he does not allege that he or any of the individual Defendants are or have been employees of the Mississippi Military Department, a state executive agency. Accordingly, both the Guard and the

(Continued on following page)

facts. Pet. App., p. 1-5 & 74-78.[5] Notably, with respect to Respondent MSANG, the Fifth Circuit found:

> [Petitioner COL (ret.)] Bryant asserts that the district court erred in dismissing his claims against MSANG under the *Feres* doctrine. His brief, however, substantively discusses the *Feres*[6] issue only in relation to his vandalism and violence claims against the Individual Appellees. The district court clearly held that *Feres* was not a ground for disposing of the vandalism claims and only applied *Feres* to Bryant's claims of employment-related retaliation against MSANG and the Individual Appellees. *Bryant v. Military Dep't of State of Miss.*, 381 F.Supp.2d 586, 594 (S.D. Miss. 2005) ("*Bryant I*"). Accordingly, the limited *Feres* discussion in Bryant's brief centers around the wrong claims and the wrong parties. Bryant's failure to adequately brief the *Feres* issue is a waiver of these claims. *United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001). Bryant did not preserve the issue merely by mentioning it in the "Statement of Issues." *See, e.g., Justiss Oil Co. v. Kerr-McGee Ref. Corp.*, 75 F.3d 1057, 1067 (5th Cir. 1996) (declining to address the merits of an issue

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district court have treated the MSANG as the intended Party-Defendant, without objection from COL (ret.) Bryant.

[5] For the convenience of the Court, a Wire Diagram reflecting the relationship of the various military entities and persons at issue herein is included at App. 1.

[6] *Feres v. United States*, 340 U.S. 135 (1950).

> raised only in the Statement of Issues and not argued in the body of the brief). Accordingly, we decline to address the propriety of the district court's dismissal under *Feres*.
>
> Moreover, the decision below stands on independent grounds. The district court ruled that all of Bryant's claims against MSANG are barred by the Eleventh Amendment and that the §§ 1983, 1985, and 1986 claims are barred because MSANG is not a "person" under those statutes. Bryant failed to argue that either of those determinations was incorrect. His failure to do so is fatal to his appeal of MSANG's dismissal from this litigation. *See, e.g., Berry v. Jefferson Parish,* 326 Fed.Appx. 748, 750 (5th Cir. 2009) (unpublished) ("An unbriefed argument is an unpreserved argument."); *see also* Fed. R.App. P. 28(a)(9)(A).

Bryant v. Military Dep't of Miss., 597 F.3d 678, 684-85 (5th Cir. 2010), Pet. App., p. 6-7.

SUMMARY OF THE ARGUMENT

Certiorari should be denied for three reasons.

First, Sup. Ct. R. 14 provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Petitioner sets forth only one question presented as to this Respondent, "[w]hether the District Court and Fifth

Circuit erred in dismissing claims against the Military Department of the State of Mississippi . . . due to a misapplication of the *Feres* doctrine. . . ."[7] Pet., p. i.

Petitioner failed to list the Eleventh Amendment and *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) bases for this Respondent's dismissal at all in his Questions Presented – meaning that even a reversal of the *Feres* ground would not change the outcome of the case as to this Respondent. Further, he also completely ignored the Fifth Circuit's finding that he waived the *Feres*, *Will* and Eleventh Amendment issues on appeal, a finding he has not challenged in his Petition.

Second, although Petitioner formally listed the *Feres* issue in his Questions Presented, his Petition fails to brief that issue *as to this Respondent* at all. Petitioner's abject failure to explain the basis for the grant of certiorari on *Feres* grounds as to this Respondent therefore waives the issue.

Third and finally, even if Petitioner had not waived any review of the *Feres*, Eleventh Amendment and *Will* grounds for this Respondent's dismissal

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[7] Servicemembers may not assert claims against the military, their superiors or other servicemembers "where the injuries arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950); *U.S. v. Stanley*, 483 U.S. 669, 683-84 (1987); *Chappell v. Wallace*, 462 U.S. 296, 304-05 (1983).

below, there is no circuit split or other ground justifying the grant of certiorari in this case on those issues.

ARGUMENT AND AUTHORITIES

I. PETITIONER'S VIOLATION OF SUP. CT. R. 14 THROUGH HIS FAILURE TO LIST THE ELEVENTH AMENDMENT, *WILL* AND WAIVER GROUNDS DISPOSITIVE IN FAVOR OF THIS RESPONDENT BELOW IS FATAL TO HIS PETITION.

Petitioner sets forth only one question presented as to this Respondent, "[w]hether the District Court and Fifth Circuit erred in dismissing claims against the Military Department of the State of Mississippi . . . due to a misapplication of the *Feres* doctrine. . . . " App. Pet., p. i.

While the *Feres* doctrine[8] was one basis for the dismissal of all Petitioner's claims against this Respondent, Pet. App., p. 6-7, 83-85, the Fifth Circuit also affirmed the district court's dismissal of all Bryant's claims against this Respondent on the basis of Eleventh Amendment immunity, as well as the fact that Respondent is not a "person" subject to liability under 42 U.S.C. §§ 1983 & 1985, under this Court's

[8] *See supra* n. 7.

holding in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Pet. App., p. 6-7, 80-83.

Additionally, the Fifth Circuit held that Bryant waived his right to appeal the judgment in this Respondent's favor, due to "Bryant's failure to adequately brief the *Feres*[, Eleventh Amendment and *Will*] issue[s]. . . ." App., p. 6-7.

Sup. Ct. R. 14 provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Petitioner failed to list the Eleventh Amendment and *Will* bases for this Respondent's dismissal at all – meaning that even a reversal of the *Feres* ground – the sole issue on which Petitioner seeks certiorari as to this Respondent – would not change the outcome of the case as to this Respondent. *See Yee v. Escondido*, 503 U.S. 519, 535 (1992) (internal quotation marks and alteration omitted) ("[U]nder this Court's Rule 14.1(a), only questions set forth in the petition, or fairly included therein, will be considered by the Court"); *Wood v. Allen*, ___ U.S. ___, 130 S.Ct. 841, 851 (Jan. 20, 2010) (internal quotation marks and brackets omitted) ("[T]he fact that petitioner discussed [an] issue in the text of his petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review").

As Petitioner failed to raise the Eleventh Amendment and *Will* dispositive grounds for judgment in Respondent's favor, they are barred from review. *See*

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 279-80 (1993) ("The 'hindrance'-clause issue is not fairly included within the questions on which petitioners sought certiorari, *see* Pet. for Cert. i; this Court's Rule 14.1(a), which is alone enough to exclude it from our consideration"). Accordingly, as with the waiver issue on which Respondent prevailed below, the grant of certiorari on *Feres* grounds would therefore be necessarily futile. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 (1976) ("Although the parties each devoted a portion of their briefs to the waiver issue, that issue was not raised in the petition for certiorari. Since we consider '(o)nly the questions set forth in the petition or fairly comprised therein,' this Court's Rule 23.1(c), we have no occasion to pass on the correctness of the decisions below on the waiver question").

II. PETITIONER'S FAILURE TO BRIEF EITHER THE *FERES*, ELEVENTH AMENDMENT OR *WILL* GROUNDS FOR THIS RESPONDENT'S DISMISSAL IS FATAL TO HIS PETITION.

Although Petitioner formally listed the *Feres* issue in his Questions Presented, his Petition fails to brief that issue as to this Respondent *at all*. Rather, all of Petitioner's arguments are directed solely at his claims against *the individual Respondents*, not the MSANG.

Petitioner made the same fatal error before the Fifth Circuit:

> Accordingly, the limited *Feres* discussion in Bryant's brief centers around the wrong claims and the wrong parties. Bryant's failure to adequately brief the *Feres* issue is a waiver of these claims. *United States v. Martinez,* 263 F.3d 436, 438 (5th Cir. 2001). Bryant did not preserve the issue merely by mentioning it in the "Statement of Issues." *See, e.g., Justiss Oil Co. v. Kerr-McGee Ref. Corp.,* 75 F.3d 1057, 1067 (5th Cir. 1996) (declining to address the merits of an issue raised only in the Statement of Issues and not argued in the body of the brief). Accordingly, we decline to address the propriety of the district court's dismissal under *Feres.*
>
> Moreover, the decision below stands on independent grounds. The district court ruled that all of Bryant's claims against MSANG are barred by the Eleventh Amendment and that the §§ 1983, 1985, and 1986 claims are barred because MSANG is not a "person" under those statutes. Bryant failed to argue that either of those determinations was incorrect. His failure to do so is fatal to his appeal of MSANG's dismissal from this litigation. *See, e.g., Berry v. Jefferson Parish,* 326 Fed.Appx. 748, 750 (5th Cir. 2009) (unpublished) ("An unbriefed argument is an unpreserved argument."); *see also* Fed. R.App. P. 28(a)(9)(A).

Bryant v. Military Dep't of Miss., 597 F.3d 678, 684-85 (5th Cir. 2010), Pet. App., p. 6-7. Petitioner's abject failure to explain the basis for the grant of certiorari on *Feres* grounds as to this Respondent thus waives the issue.

III. THERE IS NO CIRCUIT SPLIT OR OTHER JUSTIFICATION FOR A GRANT OF CERTIORARI.

Even if Petitioner had not waived any review of the *Feres*, Eleventh Amendment and *Will* grounds for this Respondent's dismissal below, there is no circuit split or other ground justifying the grant of certiorari in this case.

Every circuit to have considered the issue has found *Feres* applicable to claims brought by National Guardsmen such as this one. *E.g.*, *Walch v. Adjutant General's Dept. of Tex.*, 533 F.3d 289, 302 (5th Cir. 2008); *Wright v. Park*, 5 F.3d 586, 588 (1st Cir. 1993); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 769 (7th Cir. 1993), *cert. denied*, 510 U.S. 933 (1993); *Wood v. United States*, 968 F.2d 738, 740 (8th Cir. 1992); *Farmer v. Mabus*, 940 F.2d 921, 923-25 (5th Cir. 1991); *Lovell v. Heng*, 890 F.2d 63, 65 (8th Cir. 1989); *Watson v. Arkansas Air Nat'l Guard*, 886 F.2d 1004, 1011 (8th Cir. 1989); *Costner v. Oklahoma Army Nat'l Guard*, 833 F.2d 905, 907 (10th Cir. 1987); *Holdiness v. Stroud*, 808 F.2d 417, 426 (5th Cir. 1987); *Crawford v. Texas Army Nat'l Guard*, 794 F.2d 1034,

1036 (5th Cir. 1986); *NeSmith v. Fulton*, 615 F.2d 196, 203 (5th Cir. 1980).

Similarly, no circuit court of appeals has denied any state's National Guard Eleventh Amendment immunity in the context of civil rights claims of this nature. *E.g.*, *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1493 (10th Cir. 1983); *accord Jones v. New York State Div. of Military Affairs*, 166 F.3d 45, 49 (2d Cir. 1999) (holding that both the New York Military Department and National Guard are state entities entitled to Eleventh Amendment immunity); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 769 n. 3 (7th Cir. 1993), *cert. denied*, 510 U.S. 933 (1993) (Eleventh Amendment bars claims against Guard); *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1493 (10th Cir. 1983) (Kansas National Guard "[i]s not independent of the State of Kansas; rather, it is an arm of the state and entitled to any immunity which the state possesses"); *Hefrich v. Pennsylvania Dept. of Military Affairs*, 660 F.2d 88, 90 (3rd Cir. 1981) (military department immune under Eleventh Amendment); *Henry v. Textron, Inc.*, 577 F.2d 1163, 1164 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047 (1978) (Virginia Guard immune under Eleventh Amendment).

Finally, the fact that a state agency like Respondent MSANG[9] is not a "person" subject to

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[9] Under 10 U.S.C. § 101(c)(2), the Mississippi National Guard is one of the "[o]rganized militia of the several States . . . [;]" *see Perpich v. DOD*, 496 U.S. 334, 350-51 (1990) (recognizing that the militias are state entities); *see also Maryland ex*

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potential liability under 42 U.S.C. §§ 1983 & 1985, was conclusively established over twenty years ago by *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989).

As this Court observed in *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 536 (1992):

> Rule 14.1(a) assists the Court in selecting the cases in which certiorari will be granted. Last Term alone we received over 5,000 petitions for certiorari, but we have the capacity to decide only a small fraction of these cases on the merits. To use our resources most efficiently, we must grant certiorari only in those cases that will enable us to resolve particularly important questions.

Id. Respondent respectfully submits there is no "particularly important question[]" in this suit. The petition for writ of certiorari should be denied.

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rel. Levin v. United States, 381 U.S. 41, 48 (1965), *vacated on other grounds*, 382 U.S. 159 (1965) (citation omitted) ("[a]ll located decisions . . . hold that National Guardsmen of the several states are employees of the state except when in the actual service of the United States").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied. Respondent also requests attorney's fees and costs, including double costs, for Petitioner's filing of a frivolous petition under Supreme Court Rules 42(2) and 43(7).

Respectfully submitted,

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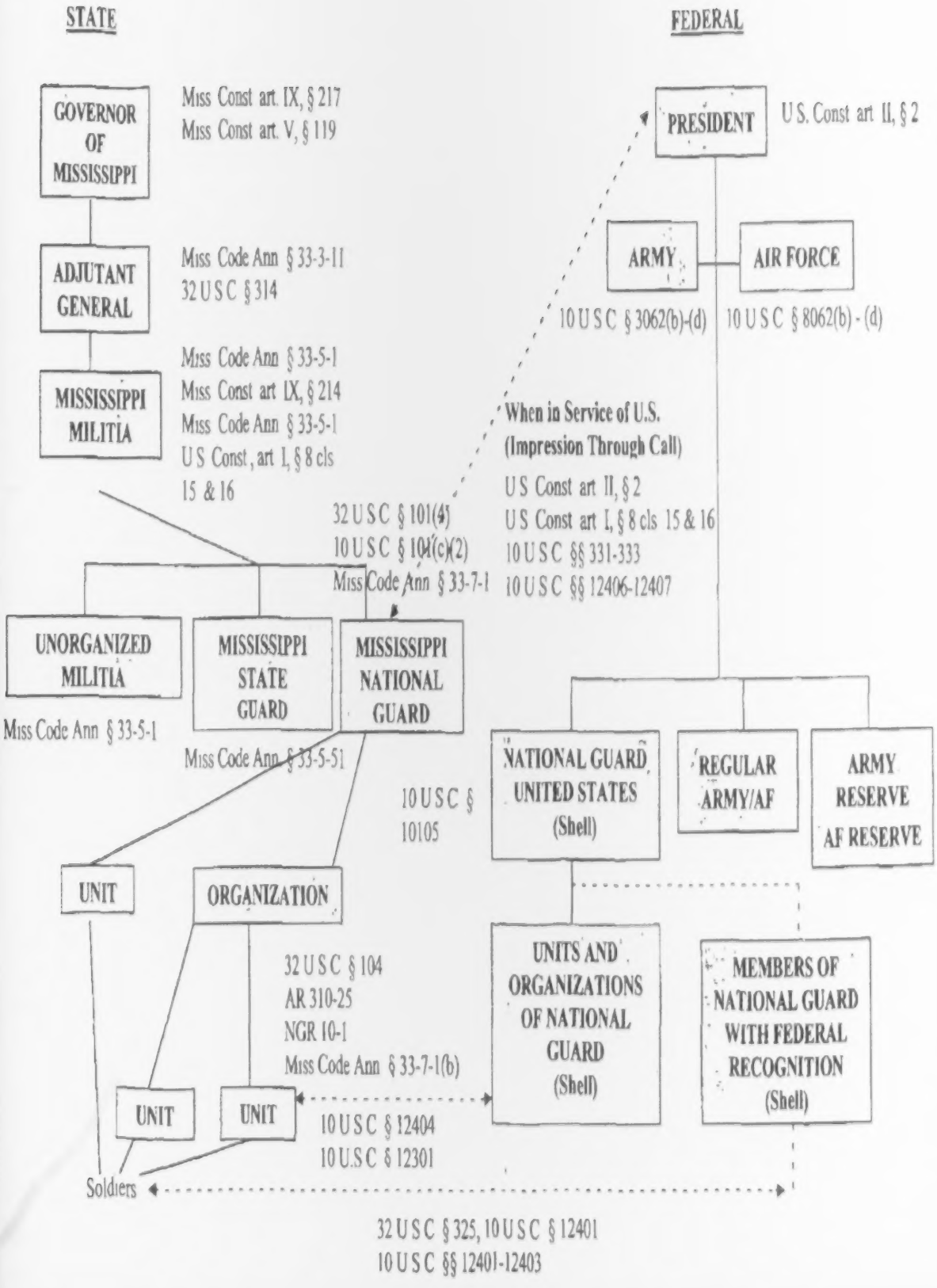
STATE
FEDERAL
GOVERNOR OF MISSISSIPPI
Miss Const art. IX, § 217
Miss Const art. V, § 119
ADJUTANT GENERAL
Miss Code Ann § 33-3-11
32 U S C § 314
MISSISSIPPI MILITIA
Miss Code Ann § 33-5-1
Miss Const art IX, § 214
Miss Code Ann § 33-5-1
U S Const, art I, § 8 cls 15 & 16
PRESIDENT
U S. Const art II, § 2
ARMY
AIR FORCE
10 U S C § 3062(b)-(d)
10 U S C § 8062(b) - (d)
When in Service of U.S. (Impression Through Call)
U S Const art II, § 2
U S Const art I, § 8 cls 15 & 16
10 U S C §§ 331-333
10 U S C §§ 12406-12407
32 U S C § 101(4)
10 U S C § 101(c)(2)
Miss Code Ann § 33-7-1
UNORGANIZED MILITIA
Miss Code Ann § 33-5-1
MISSISSIPPI STATE GUARD
MISSISSIPPI NATIONAL GUARD
Miss Code Ann § 33-5-51
10 U S C § 10105
NATIONAL GUARD UNITED STATES (Shell)
REGULAR ARMY/AF
ARMY RESERVE AF RESERVE
UNIT
ORGANIZATION
32 U S C § 104
AR 310-25
NGR 10-1
Miss Code Ann § 33-7-1(b)
UNITS AND ORGANIZATIONS OF NATIONAL GUARD (Shell)
MEMBERS OF NATIONAL GUARD WITH FEDERAL RECOGNITION (Shell)
UNIT
UNIT
10 U S C § 12404
10 U.S.C § 12301
Soldiers
32 U S C § 325, 10 U S C § 12401
10 U S C §§ 12401-12403